



# Mergers & Acquisitions

in 60 jurisdictions worldwide

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# Merger Control in Canada

**Susan M Hutton**

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*The views expressed herein are those of the author alone, and do not necessarily represent those of Stikeman Elliott LLP or its clients.*

Acquisitions of Canadian businesses are potentially subject to advance regulatory review, in general, under the Competition Act and the Investment Canada Act, and in the case of federal transport undertakings, the Canada Transportation Act. Acquisitions in certain regulated industries, such as broadcasting and telecommunications for example, may be subject to additional scrutiny. This section explains the broad outlines of merger control in Canada under each of these statutes, and highlights significant recent developments.

## **Merger control under the Competition Act (Canada)**

The Competition Act (Canada) is administered and enforced by the Commissioner of Competition (the Commissioner), who is the head of the Competition Bureau (the Bureau). The Bureau is an independent agency that for budgetary purposes is part of the federal Department of Industry Canada. The Commissioner (the only person with standing to challenge a merger under the Competition Act) may bring an application to the Competition Tribunal (an administrative tribunal comprising lay persons and federal court judges) for up to one year after closing if she is of the opinion that the merger is likely to lessen or prevent competition substantially in a market affecting Canada.

The Competition Act establishes a regime for compulsory advance notification of certain acquisitions and business combinations that exceed specified monetary and shareholding thresholds. Pre-merger notification triggers a mandatory waiting period, which must expire or be terminated or waived before closing may occur. Importantly, the Bureau asserts jurisdiction over all mergers (broadly defined as the acquisition in any manner of control over or a significant interest in the business of another person) that have competitive impact in Canada. Accordingly, even non-notifiable transactions are subject to Bureau scrutiny and, potentially, remedies in Canada (for non-notifiable transactions where complaints are likely, parties may seek positive clearance by applying to the Commissioner for an Advance Ruling Certificate (ARC) – see below).

The merger notification provisions of the Competition Act apply to several types of transaction:

- acquisitions of assets;
- acquisitions of shares where the acquirer will, as a result, have beneficial ownership of more than 20 per cent (public companies) or 35 per cent (private companies) or, if those thresholds are already exceeded, more than 50 per cent of the voting shares of the corporation;
- amalgamations; and
- the formation of, or acquisition of interests in, unincorporated business combinations (in the case of the acquisition of interests in existing combinations, again, the 35 per cent or 50 per cent equity interest threshold must also be exceeded).

Notification may be triggered even if the acquirer has no business operations in or sales into Canada, and even if there is no competitive overlap whatsoever, and in the case of asset acquisitions,

even if no business is acquired as a result. That said, a pre-condition to notification is that the target must own or control an operating business in Canada (ie, must have a place of business in Canada to which employees or agents employed in connection with the business ordinarily report for work).

Certain exemptions also apply including in respect of, for example, (some) security realisations, (some) asset securitisation transactions, acquisitions of (some) assets in the ordinary course of business and the formation of (some) joint ventures.

The thresholds for pre-merger notification under the Competition Act depend on the structure of a given transaction. Generally speaking, a proposed transaction must be notified in Canada if it meets the following thresholds:

- the ‘size of parties’ threshold: the combined book value of assets in Canada or of gross revenues in, from or into Canada of all of the parties to the transaction, together with their affiliates, must exceed C\$400 million; and
- the ‘size of target’ threshold: the book value of the target’s assets in Canada, or of the gross revenues from sales in or from Canada generated by those assets, must exceed C\$73 million (for transactions closing in 2011 – this threshold may be indexed annually to account for inflation); and
- for ‘amalgamations’, at least two of the amalgamating corporations (including affiliates) must have assets in Canada or gross revenues from sales in, from or into Canada exceeding C\$73 million, and the value of the assets in Canada of the continuing corporation or the gross revenues from sales in or from Canada generated by those assets must also exceed C\$73 million (again, this may be indexed annually for inflation).

All parties to the transaction are responsible for filing notification materials, and there are special procedures for dealing with unsolicited takeover bids. There are criminal sanctions for failure to notify without just and sufficient cause, and monetary penalties and other sanctions for substantially completing a transaction prior to expiry or termination of the waiting period (gun-jumping).

In terms of merger review process, the Competition Act was amended in 2009 to harmonise Canada’s merger review process with that of the United States. Notified transactions cannot be closed within an initial 30-day suspensory waiting period, within which the Commissioner may issue a supplementary request for information (an SIR in Canada, equivalent to a ‘second request’ in the United States). Issuance of an SIR causes the waiting period to be extended until 30 days after compliance with the request for additional information and documents (a process that typically takes at least two months or more). This procedure gives considerably more control over the merger review process to the Commissioner than the prior procedure, pursuant to which merging parties were able, by filing ‘long-form’ notification materials, to trigger a 42-day waiting period, which the Commissioner could extend only by obtaining an interim injunction from the Competition Tribunal.

Transactions that do not raise significant competition concerns (the vast majority) have been largely unaffected by the new procedure. Parties to such transactions are often able to avoid making formal notification filings and efficiently obtain a clearance by requesting and obtaining an ARC following the submission of a ‘white paper’ explaining the competitive impact of the transaction – often in 14 days or less. ARC requests, generally speaking, outline for the Commissioner the information relevant to her assessment of the likely competitive impact of the proposed transaction: a description of the parties and the transaction and the motivation therefor, the markets in which there is horizontal or vertical overlap, market shares, remaining competitors, barriers to entry, anticipated efficiencies and other information relevant to an assessment of the competitive impact of the proposed transaction.

If an ARC is issued, the transaction is exempt from notification, and the Commissioner is precluded from challenging the transaction unless new and materially different information comes to light. Even if an ARC is not issued, the Bureau instead often issues a non-binding ‘no-action’ letter, in which case it may (and usually does) waive the requirement to file notification materials. Accordingly, in Canada, the vast majority of notifiable transactions are the subject of ARC/no-action letter requests, rather than formal notifications. That said, only the filing of formal notification materials will trigger the waiting periods, so where timing is an issue and/or parties wish to be able to close upon expiry of the waiting period, notifications are also filed.

A revised Merger Policy as well as a Merger Handbook and a Merger Procedures Guide were issued in October 2010. The principal focus of these publications was to align internal (non-binding) guidelines for the length of time the Bureau will take to review a transaction with the new statutory waiting periods. As before, non-complex transactions continue to be processed within 14 days of the receipt of the necessary information for the Bureau to perform its review (generally speaking, such information is that contained in a typical ARC request, along with customer contact lists if market shares are not de minimis). More complex transactions will generally be dealt with within 45 days of the receipt of all requested information (if this extends beyond the 30-day statutory waiting period, the Commissioner sometimes requests parties to agree not to close until her review is complete) or, if an SIR is issued, within the statutory time period (ie, 30 days after compliance with the SIR).

Following the issuance of revised Merger Enforcement Guidelines (MEGs) in the United States in 2010, the Competition Bureau has announced that it will issue targeted revisions to the Canadian MEGs, scheduled for release in the autumn of 2011 (a draft will be issued in June).

#### **Merger control under the Investment Canada Act (ICA)**

The Investment Canada Act (ICA) applies to any ‘acquisition of control’ by a ‘non-Canadian’ (ie, by a purchaser the ultimate control of which resides outside of Canada) of a ‘Canadian business’ (ie, a business carried on in Canada that has a place of business in Canada, an individual or individuals in Canada who are employed or self-employed in connection with the business and assets in Canada used in carrying on the business – a business is ‘Canadian’ whether or not it is controlled by Canadians). Such transactions are subject to either a notification or an application for review. If reviewable, transactions generally may not proceed until the minister of industry (and/or, in the case of ‘cultural businesses’, the minister of Canadian heritage) has provided an opinion that the transaction is likely to be of ‘net benefit’ to Canada, according to prescribed criteria.

An ICA notification is essentially an administrative formality, constituting notice of the investment (with certain required information in respect of the investor, its ultimate control and the Canadian business) to be filed either before or within 30 days of closing. An application for review, on the other hand, is more onerous (and contains detailed information including the investor’s ‘plans’ for the Canadian business in respect of the various factors relevant

to the ‘net benefit’ test). Approval for reviewable transactions is usually granted only on condition that the investor agrees to binding undertakings (commitments) in respect of the conduct of the Canadian business, often for between three and five years, but sometimes longer. Investments are only reviewable, however, where certain thresholds are met.

Assuming a purchaser is a ‘WTO investor’ (ie, ultimately controlled by WTO nationals) within the meaning of the ICA, a review application is required for direct acquisitions of control if the value of the assets (calculated in the prescribed manner) of the Canadian business, and all other entities in Canada the control of which is being acquired, equals or exceeds C\$312 million (for transactions closing in 2011; this is indexed annually for inflation). (Pursuant to amendments made to the ICA in 2009, this ‘book value of the assets’ threshold is supposed to be changed to an ‘enterprise value’ threshold, as soon as implementing regulations are finalised. The relevant ‘enterprise value’ threshold is to move to C\$600 million, with further increases to occur in subsequent years to C\$1 billion, and indexed to inflation thereafter. Draft regulations issued in late 2009 were the subject of considerable comment and, while the government is considering those comments, the process appears to be stalled.) Indirect acquisitions of control (ie, the acquisition of a Canadian business by virtue of the acquisition of an entity outside Canada that controls an entity in Canada carrying on the Canadian business) are typically exempt from review if either the purchaser or the vendor is WTO-controlled.

There are different thresholds, however, for non-WTO investors, and for Canadian ‘cultural businesses’ (ie, those involving, in any manner, newspapers, magazines, periodicals, books, films, videos, recorded or sheet music and television or radio broadcasting). For such transactions, the C\$312 million threshold for direct acquisitions is reduced to only C\$5 million, and indirect acquisitions are reviewable where the relevant value of the assets equals or exceeds C\$50 million.

Guidelines were issued in late 2007 concerning reviews of acquisitions of control of Canadian businesses by foreign state-owned enterprises (SOEs). The SOE Guidelines clarify that part of the ‘net benefit’ consideration by the minister under the ICA will include consideration of the corporate governance and reporting structure of the SOE to ensure that the investor will adhere to Canadian standards of corporate governance and comply with Canadian laws and practices, as well as to ensure that the Canadian business will continue to be able to operate on a commercial basis with regard to exports, the location of processing, participation by Canadians, support for innovation and research and development, and capital expenditures necessary to maintain global competitiveness.

Amendments to the ICA in 2009 created the possibility of a separate ‘national security’ review process to screen investments in Canada that are potentially ‘injurious to national security’. A national security review may be ordered regardless of whether the transaction is subject to ‘net benefit’ review. The salient elements of the national security review process are:

- There is no definition of ‘national security’ and no illustrative list of the types of transaction that might raise such concerns (that said, the requirement that the minister of industry raise them after consultation with the minister of public safety and emergency preparedness perhaps indicates that traditional security concerns are intended to be the focus).
- The federal cabinet is empowered to prohibit closing of the investment, to condition the investment on certain commitments or undertakings by the foreign investor or to require the divestiture of the Canadian business (the requirement that only the federal cabinet can take action should ensure that national security reviews will be conducted only if serious issues are raised).
- There is no minimum review threshold, with the result that transactions involving very small targets are potentially reviewable, as well as minority investments for less than control. National security reviews may also be conducted in relation to businesses

that would not meet the ‘Canadian business’ definition referred to above (requiring only assets, employees or a place of business in Canada, rather than all three as is required for a ‘Canadian business’ for ‘net benefit’ review purposes).

- There is no formal requirement to notify the government pre-closing if ministerial approval is not otherwise required, but the government is subject to a 45-day deadline for issuing notice of an actual or potential review, after being notified of the transaction – as a result it is possible for foreign investors to ensure pre-closing that no national security review will be performed, by formally notifying the minister of industry of the proposed transaction.
- In late 2009, regulations implementing certain aspects of the national security review process came into force, setting out different timelines for reviews, depending on numerous factors specific to the transaction.

Following the controversy surrounding the minister of industry’s rejection of the bid by BHP Billiton for PotashCorp on ‘net benefit’ grounds, parliament commenced a review of the ICA to determine if amendments were required to clarify the test, or to introduce greater transparency into the process. The hearings were terminated by the federal election call in March 2011, but may resume.

#### **Merger control under the Canada Transportation Act (CTA)**

All transactions involving a ‘transportation undertaking’ under federal government jurisdiction that are required to be notified under the Competition Act are also required under the Canada Transportation Act to be contemporaneously notified to the minister of transport. Notice to the minister is to include the same information as provided to the Commissioner in a pre-merger notification, as well as any information with respect to the public interest as it relates to national transport that is required by any guidelines issued by the minister. Draft guidelines were issued in June 2008, and request

information on issues such as the impact of the transaction on users of the transport system, on communities serviced, on other transport undertakings, on Canadian trade, management, productivity, and on other aspects of the Canadian public interest such as the environment, safety, security and low income workers and families. Failure to notify the minister when required to do so under the CTA is a criminal offence punishable by a fine of up to C\$50,000.

Parties may not close a proposed transaction subject to the CTA until either:

- the minister notifies the parties (within 42 days after a filing has been made) that the transaction does not raise public interest issues related to national transport; or
- where the minister is of the opinion that public interest issues are raised, the Governor in Council (effectively the federal cabinet) approves the transaction on the recommendation of the minister following any public interest inquiry (which may take 150 days or longer), taking into account any undertakings agreed to by the parties to address the issues raised. In this case, the Commissioner under the Competition Act must provide a report to the minister and the parties to the transaction on the Commissioner’s views as to any concerns regarding potential prevention or lessening of competition that may occur as a result of the transaction.

Although there is no definition in the CTA of the term ‘transportation undertaking’, the term is generally understood to refer only to businesses that supply transport services to third parties, but this includes pipelines as well as businesses the principal purpose of which may not be transport. Moreover, the federal government does not have jurisdiction, and the CTA does not apply, to road transport services that do not cross provincial or international borders. That said, the federal government has delegated its licensing powers in respect of much road transport to the provinces, such that the nature of the licences held by the target is not necessarily determinative.



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